

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of LARRY ORR and TENNESSEE VALLEY AUTHORITY,
WATTS BAR NUCLEAR PLANT, Spring City, TN

*Docket No. 98-861; Submitted on the Record;
Issued February 4, 2000*

DECISION and ORDER

Before MICHAEL J. WALSH, WILLIE T.C. THOMAS,
MICHAEL E. GROOM

The issue is whether the Office of Workers' Compensation Programs properly determined that appellant had a 61 percent loss of wage-earning capacity.

On April 27, 1990 appellant, then a 41-year-old steamfitter, was stepping off a grating onto a pipe when he slipped and fell. He grabbed a piece of steel to stop his fall, hitting his left leg on the pipe and his right leg on the grating. He filed a claim for injuries to his back, right knee and left leg. He was placed on light duty and furloughed from the employing establishment on December 31, 1990. He did not return to work. The Office accepted appellant's claim for contusions and abrasions of the right knee and back strain. The Office subsequently accepted that appellant had a tear of the right medial meniscus due to the employment injury. He underwent surgery for a partial meniscectomy on March 5, 1991. The Office began payment of temporary total disability compensation effective December 31, 1990.

In an April 10, 1997 decision, the Office found that appellant could perform the duties of an accounting clerk and therefore reduced his compensation to represent a 61 percent loss of wage-earning capacity. In a July 19, 1997 letter, appellant requested reconsideration. In an August 18, 1997 merit decision, the Office denied appellant's request for modification of the April 10, 1997 decision. In an August 26, 1997 letter, appellant again requested reconsideration. In a November 26, 1997 merit decision, the Office again denied modification of the April 10, 1997 decision.

The Board finds that the Office improperly determined appellant's loss of wage-earning capacity.

Once the Office has made a determination that a claimant is totally disabled as a result of an employment injury and pays compensation benefits, it has the burden of justifying a subsequent reduction of compensation benefits. Once the medical evidence suggests that a claimant is no longer totally disabled but rather is partially disabled, the issue of wage-earning

capacity arises.¹ Wage-earning capacity is a measure of the employee's ability to earn wages in the open labor market under normal employment conditions given the nature of the employee's injuries and the degree of physical impairment, his or her usual employment, the employee's age and vocational qualifications and the availability of suitable employment.² Accordingly, the evidence must establish that appellant can perform the duties of the job selected by the Office and that jobs in the position selected for determining wage-earning capacity are reasonably available in the general labor market in the commuting area in which the employee lives. In determining an employee's wage-earning capacity, the Office may not select a makeshift or odd lot position or one not reasonably available on the open labor market.³

The Office determined that appellant could perform the duties of an accounting clerk, a sedentary position which required the ability to lift up to 10 pounds and required 6 months to 1 year of training. The evidence of record reveals that appellant had been receiving vocational rehabilitation benefits for an associate degree program in accounting and had completed all but one of the required courses for the program. The evidence therefore shows that appellant met the vocational requirements for the position. The state employment service indicated that there were 3,437 positions for accounting clerks, bookkeepers and auditing clerks within appellant's commuting area. The position therefore was performed in sufficient numbers so as to be considered reasonably available within appellant's commuting area. However, the medical evidence in support of the Office's decision appears incomplete. In a March 23, 1993 work restriction evaluation form, Dr. W. Carl Dyer, Jr., a Board-certified orthopedic surgeon, indicated that appellant could sit intermittently for seven hours a day, and walk and stand intermittently for two hours a day. Dr. Dyer reported that appellant could lift up to 20 pounds but could not perform repetitive lifting, bending or stooping. He concluded that appellant could work eight hours a day. In a May 8, 1997 note, Dr. Dyer indicated that appellant could perform no repetitive lifting, bending, stooping or tugging and no lifting over 20 pounds. However, Dr. Dyer, after the March 23, 1993 report, did not readdress the issue of whether appellant could work eight hours a day. As this report was made four years before the modification of appellant's compensation benefits, it does not form an adequate basis for a loss of wage-earning capacity determination. The May 8, 1997 note did not list any current findings, and was not accompanied by any indication that it was made with the benefit of a recent physical examination of appellant. Therefore, the medical evidence is insufficient to support the finding that appellant was physically capable of performing the position of accounting clerk at the time of the Office's decision.

The Office did not properly consider whether appellant had preexisting conditions which would affect his wage-earning capacity. In determining loss of wage-earning capacity, where the residuals of an injury prevent an employee from performing his regular duties, the medical conditions which preexisted the injury, in addition to the injury-related conditions, must be taken into consideration in the loss of wage-earning capacity determination.⁴ In a July 19, 1995 report,

¹ *Garry Don Young*, 45 ECAB 621 (1994).

² *See generally*, 5 U.S.C. § 8115(a); A. Larson *The Law of Workers' Compensation* § 57.22 (1989).

³ *Steven M. Gourley*, 39 ECAB 413 (1988); *William H. Goff*, 35 ECAB 581 (1984).

⁴ *Hubert R. Hudson*, 22 ECAB 179 (1971); *Robert E. Hendrick*, 15 ECAB 517 (1964).

Dr. Charles T. Nevels, a Board-certified psychiatrist, indicated that appellant had been hospitalized from May 18 through June 29, 1995 for delayed, chronic post-traumatic stress disorder. He gave a description of appellant's service in the Vietnam War and exposure to combat situations. He concluded that appellant was "never employable." In a May 8, 1996 report, Dr. Philip A. Johnson, a clinical psychologist, diagnosed chronic, severe post-traumatic stress disorder with somatization and phobias and a personality disorder with paranoid and schizotypal features. In an August 14, 1996 report, Dr. Charles Huddleston, a Board-certified psychiatrist, indicated that an electromyogram showed appellant had neuropathy in the sural nerve in the left leg, which he related to shrapnel. In a September 13, 1996 report, Dr. Charles R. Adcock, an internist, indicated that examination showed appellant had prostate complications and had evidence of dermatologic complications from exposure to Agent Orange. He also noted the neurological evidence of nerve damage in the left leg and appellant's treatment for post-traumatic stress disorder. He concluded that appellant was totally disabled. He stated that appellant could not lift anything over five pounds and should not do any job which would require prolonged standing or sitting.

The Office had referred appellant for an examination and second opinion on his psychiatric condition. In an August 22, 1995 report, Dr. Wayne Y. Kim, a Board-certified psychiatrist, noted that, in examination, appellant appeared to have severe discomfort from his back. He indicated that appellant was somewhat histrionic and dramatic. Dr. Kim related that appellant was cooperative but his underlying anger was apparent. He found no looseness of association or tangentiality. Dr. Kim stated that appellant had no overt psychotic distortion in thinking or perception. He commented that appellant, however, reported experiencing nightmares and flashbacks. Dr. Kim diagnosed chronic post-traumatic stress disorder but concluded that appellant could perform the duties of an accounting clerk. In a separate form report, Dr. Kim indicated that appellant could not work and complete tasks with supervision, could not maintain concentration and pace at acceptable levels, could not perform high volume work, and could not adapt to stressful work situations such as deadlines, changes in priority or changes in routine. Agreement with such statements contradicted his finding that appellant could perform the duties of an accounting clerk. Dr. Kim has not explain his contradictory remarks. His report therefore has limited probative value and is insufficient to show that his preexisting psychiatric condition would allow appellant to perform the duties of the position selected.

The Office did not adequately take into account appellant's preexisting conditions from his war service in determining his wage-earning capacity, including consideration of his post-traumatic stress disorder, nerve damage in the left leg and other conditions related to his exposure to Agent Orange. This failure, combined with the lack of current medical evidence to show appellant's work limitations, demonstrates that the Office did not meet its burden in reducing appellant's compensation through its loss of wage-earning capacity determination.

The decisions of the Office of Workers' Compensation Programs, dated November 26, August 18 and April 10, 1997, are hereby reversed.

Dated, Washington, D.C.
February 4, 2000

Michael J. Walsh
Chairman

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member